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IN THE

Supreme Court of the United States

No. 254.

OCTOBER TERM, 1929.

NEW JERSEY BELL TELEPHONE COMPANY,
Appellant,

vs.

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
Appellee.

On Appeal from the Court of Errors and Appeals of New Jersey.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

(b) and (c)

Reference to the official report of the opinions delivered in the Court below and a statement of the grounds on which the jurisdiction of this Court is invoked are stated on page 1 of appellant's brief.

(d)

The statement of the case contained in appellant's brief is correct except for the following additions which we deem pertinent to the argument.

1. Appellant's business is conducted entirely within the State of New Jersey (R. 17).

2. Appellant was incorporated August 12, 1904 (R. 3, 5, 7) as Delaware and Atlantic Telegraph and Telephone Company, which conducted a telephone business in the southern part of the State. On or about October 1, 1927, its name was changed to New Jersey Bell Telephone Com-

pany (R. 10), when it purchased and assumed all the property, franchises and business of the New York Telephone Company (R. 9, 12) in the northern and central areas of the State (R. 9). From that time forward appellant, in its present name and as the successor of both companies has conducted a telephone business throughout the State of New Jersey.

(f)

SUMMARY OF THE ARGUMENT.

1. *The Tax in question imposes no burden on interstate commerce in violation of the commerce clause of the Constitution of the United States.*

ARGUMENT.

The question of the validity of the act in question, and of the tax assessed thereunder, under the Constitution of New Jersey, cannot be argued in this Court.

At pages 12, 13, 17 and 18 of appellant's brief it is argued that if this is a property tax, it violates the provisions of Article IV, Section VII, Paragraph 12, of the Constitution of New Jersey.

The reasons for setting aside the assessment, assigned by appellant upon a writ of certiorari before the New Jersey Supreme Court (R. 16 and 17) alleged only that said tax imposed a burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

The opinion in the Supreme Court states:

> "The sole reason assigned for setting aside the tax was the method, by which the amount of the tax was computed. The allegation is, that in so far as it is based in part upon gross receipts derived from interstate commerce, it is a regulation of, and burden upon interstate commerce, in violation of

Article One (1), Section Eight (8), Paragraph Three (3), of the Constitution of the United States." (R. 23, 24.)

The notice of appeal from the judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals (R. 28 and 29), specified only the same question.

The judgment of the Supreme Court was unanimously sustained by the Court of Errors and Appeals in a *Per Curiam* opinion, for the reasons expressed in the opinion delivered in the Supreme Court (R. 30).

This question was not raised in, or considered by, either of the courts below, and is not raised in the assignment of errors on the appeal to this court (R. 32, 33).

It is the settled rule that this court will not consider, on appeal, questions not raised in, or considered by, the court below.

> *White River Lumber Co.* v. *Arkansas,* No. 101, October Term, 1928, decided May 27, 1929, United States Supreme Court Adv. Op. (June 15, 1929), pages 512, 515.

Appellant therefore cannot be heard in this court to argue that either the act or the tax in question is in violation of the Constitution of New Jersey.

If, however, the Court should consider this question to be vital on this appeal, it may defer decision of the federal question and refer the case back to the New Jersey courts for decision of the question under state law.

> *Missouri, ex rel., Wabash R. Co.* v. *Public Service Commission,* 273 U. S. 126, 130.

The tax in question imposes no burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

The assignment of errors (R. 32 and 33), while three in number, raise but one question, namely:

Whether the tax involved in the case imposes a burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

The appellant was incorporated under an act entitled—"An act to incorporate and regulate telegraph companies," approved April 9, 1875 (Revision of 1877, p. 1174) and also under an act entitled "An Act concerning corporations" (Revision of 1896) approved April 21, 1896 (P. L. 1896, p. 277) and their various supplements and amendments, respectively, with full power to erect and maintain the necessary poles, wires, conduits and other fixtures in, upon, along, over or under any street or public place upon obtaining the consent of the owner of the soil and the local authorities, and through, across or under any of the waters within the state without any consent, and upon, through, or over any other land upon payment of compensation to the owner. The power of eminent domain was conferred. It has since acquired, either directly or through subsidiary or predecessor companies, many theretofore existing franchises to use public streets.

As originally passed, the act of 1875 applied only to telegraph companies, but its application was extended to telephone companies by an amendment (P. L. 1890, p. 491).

Section 5 required such companies to pay to the state an annual tax of one-half of one per cent. upon the amount of their capital stock. (Revision of 1877, p. 1175.)

From the time of the enactment of the act of 1875, until 1884 telephone companies paid three different forms of taxes:

1. A capital stock tax of one-half of one per cent. to the state.

2. An *ad valorem* tax on its tangible property in each municipality.

3. Such amount as they agreed to pay to the municipalities for the special franchise to use the streets and public places.

By an act entitled—"An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884 (P. L. 1884, p. 232), telegraph and telephone, and certain other public utility companies were required to pay a franchise tax, measured by 2% of gross receipts, to be ascertained and determined in a manner substantially similar to that provided in the Act of 1900, in lieu of the tax of one-half of one per cent. on capital stock.

Prior to the enactment of the Act of 1900 corporations, like the appellant, using the public streets for their facilities, in order to obtain the municipal consents for the erection and maintenance of their lines in the street, were required to pay to the municipalities direct such reasonable amounts therefor as they were able to agree with the municipaiities.

Jersey City v. *Jersey City and Bergen Ry. Co.*, 70 N. J. L. 360;

Eatontown v. *Monmouth County Electric Co.*, 78 N. J. L. 493.

If the objections to the tax which the appellant now makes are valid, they were equally valid against either or both of the previous methods employed and to which the appellant, and its predecessors in interest have sub-

mitted without question since 1884. These taxes upon special or exclusive rights within the streets have been held by New Jersey courts not to be within the scheme of the law taxing tangible property, but to be imposed upon the right of enjoyment of special privileges in the streets, and justified by reason of that enjoyment.

Jersey City v. *North Jersey Street Ry. Co.*, 74 N. J. L. 774;

Atlantic City and S. R. R. Co. v. *State Board*, 88 N. J. L. 219;

Newark v. *State Board*, 67 N. J. L. 246.

By the act of 1900 (P. L. 1900, p. 502, as amended P. L. 1917, p. 42) the property of the appellant is divided into two classes.

(a) Real and personal (tangible property).

(b) Franchises (intangible property).

The real and personal, or tangible property, whether located in the public streets or on private property, is assessed locally in each municipality in the same manner and at the same rates as all private property, and the tax is paid to the municipality (Section 2, P. L. 1900, p. 502).

The real and personal property so assessed consists of physical objects, including land, buildings, fixtures, poles, brackets, cross-arms, insulators, wire, etc., and the amount of the assessment represents the true or intrinsic value of these naked elements existing within the municipality.

The stipulated record herein expressly states that no intangible property was assessed locally and that all intangible property is included in the tax in dispute (R. 18, pgf. 4).

The local assessors report to the County Board of Assessors and it, in turn, reports to the appellee, the value, so assessed, of that portion of the aforesaid tangible property located in or upon or under any street or public

place (Section 3, P. L. 1900, p. 502, as amended P. L. 1918, p. 907). The appellant is required on or before February 1, of each year, to make a report to the appellee of the gross receipts of its business over, on, in, through or from its lines in the State for the year ending the preceding December 31st, together with a statement of the length of its whole line and the length of its line along any street, highway, road, lane or other public place. The appellee then assesses upon the appellant a tax measured by 5% of the amount of such proportion of such gross receipts as the length of its line along, in, on or over any such street, highway, road, lane or other public place bears to the length of the whole line in the State (Section 4, P. L. 1900, p. 502, as amended by P. L. 1927, p. 567).

This tax is then apportioned and distributed to the various municipalities (or taxing districts) in proportion to the value of the appellant's tangible property located in, upon or under any public street, highway, etc., therein as shown by the statements filed with the appellee (Section 6, P. L. 1900, p. 502, as amended P. L. 1927, p. 567).

The Act of 1900 substituted for the three previously existing forms of taxation, two forms, as follows:

1. A tax on tangible property, both real and personal, within the municipalities or taxing districts assessed locally at the local rate for all private property.

2. A tax, measured by 5% of the gross receipts, to cover all franchises or intangible property, such as:

(a) the franchise or privilege of being a corporation,

(b) the *special* franchise or privilege of occupying streets and public places,

The act expressly declares this tax to be in lieu of all other franchise taxes, and that all payments to municipalities under previous special franchise agreements for

the use of streets shall be credited on the amount of the tax assessed under this act (Sec. 7, P. L. 1900, p. 504). It therefore clearly appears that the Legislature expressly intended that the special franchise to occupy and use the public streets, which is a property right, was to be taxed under this act and that the measure of the tax therein prescribed should include the tax thereon. It is clearly not an occupation tax, since it is not measured by *all* of the gross receipts of the appellant.

It is worth while to consider in detail what this intangible property includes.

1. The right of eminent domain, which is not enjoyed by the corporations who pay only a franchise tax for the privilege of being a corporation.

2. The right to tear up and occupy the public streets by digging trenches to lay and repair conduits, or for the erection and maintenance of poles and wires. These structures become fixtures in and under the streets and occupy a portion of the street to the exclusion of other public use.

3. The benefit of the public policy of the State of New Jersey to have a regulated monopoly of its business within the territory served.

Section 24 of an act entitled, "An act concerning public utilities; * * *," approved April 21, 1911 (P. L. 1911, p. 374), provides as follows:

> "No privilege or franchise hereafter granted to any public utility as herein defined (including telephone companies), by any political subdivision of this State shall be valid until approved by said Board, such approval to be given when, after hearing, said Board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests * * *."

It has been held without variation that thereby the Legislature of New Jersey adopted the policy of regulated monopoly in substitution for competition in public utility service.

Re Atlantic Highlands Gas Co., 1 N. J. Pub. Util. Com. Rep. 7;

Re Consumers Gas Co., 1 N. J. P. U. C. Rep. 650;

Re Eastern Telegraph Company, 1 N. J. P. U. C. Rep. 733;

Re Phillipsburg Light, Heat and Power Company, 2 N. J. P. U. C. Rep. 379;

Re Patrons Telephone Company, 2 N. J. P. U. C. Rep. 456;

Re Jersey Power Company, 2 N. J. P. U. C. Rep. 463;

Re New Jersey and Pennsylvania Traction Co., 4 N. J. P. U. C. Rep. 351;

Re Lakewood and Coast Electric Company v. *Atlantic Electric Light Co.*, 4 N. J. P. U. C. Rep. 540;

Re Peoples Water Company, 5 N. J. P. U. C. Rep. 126;

Re Morris and Somerset Electric Company, 10 N. J. P. U. C. Rep. 322.

This policy has also been sustained by the Courts of New Jersey.

Hunter v. *Board of Public Utility Commissioners*, 1 N. J. Miscl. Rep. 408; 141 Atl. 90.

4. The additional value of the naked physical elements, assembled and co-ordinated into a functioning institution ready for and actually engaged in business, known as "going concern value," which, though intangible, is nevertheless substantial.

None of these four rights or benefits belong to corporations organized under the general corporation act, who pay a license tax solely for the privilege of existing in unity and perpetuity as a corporation.

All of these four rights and benefits are bestowed by the State upon appellant solely in consideration of the taxes sought to be imposed by this act.

The privileges which the appellant enjoys are not like those of the bus companies, whose cases have been before this court. The buses use the highways in common with other persons. Their equipment is transitory—it passes along the highways from one state to another and occupies a given space only momentarily. They have no permanent or exclusive privileges. Yet this court held that even they could be required to pay some tax for the use of the improved highways. Here, the equipment of the appellant is fixed and permanent in the highways, and it has an exclusive privilege.

It is true that the act calls this a "franchise" tax, but it is obviously not merely a "license" tax. It is more than that. It is a tax on the property value of a special franchise of privilege to enjoy all these benefits which other corporations who pay only a "license" tax for the mere privilege of being corporations do not enjoy. The generic name given to the tax on intangible property is to distinguish it from a tax on tangible property, rather than an attempt to classify it for judicial purposes.

In *Postal Tel. Cable Co.* v. *Adams*, (155 U. S. 688) this court held that the tax there involved was a property tax, even though the act in question expressly called it a privilege tax.

This is not a tax *upon* the gross receipts. It is a tax, in lieu of a direct property tax, upon substantial and valuable property rights which may be sold or assigned

for value and were, in part, sold for value in 1927 by the New York Telephone Company to the appellant.

The tax in question, measured by 5% of gross receipts (including those from interstate messages) has been applied to appellant in the same manner as now complained of for the past 25 years and this is the first time that it has raised the question, or contested the tax on this ground.

Appellant is authorized to do business only in New Jersey.

All of its property, equipment and franchises are within that State (R. 17, pgf. 2). It transacts no business and carries no messages outside of the State. All interstate messages over its lines in New Jersey are received from or delivered to connecting companies in the adjoining states at the state boundary. Its gross receipts, as reported to the appellee, and involved in this case, (including those from interstate messages) are limited to compensation for service rendered on its line within the State (R. 18, pgf. 5). The remainder of the toll charges on interstate messages go to the connecting lines. Its revenues, therefore, contain nothing for the transmission of messages over lines outside of the State.

The present tax is not directed at gross receipts from, or intended to affect, interstate commerce. The effect, if any, upon interstate commerce is purely incidental and indirect.

Out of the 15,203 miles of appellant's line in New Jersey, 8,403 miles (more than half) are in the public streets (R. 13).

Without the privilege of using the streets, appellant would be required to purchase, maintain and pay local taxes on 8,403 miles of additional private right of way and pay interest (probably 6%, at least) on the cost thereof.

In 1928 the average of the local tax rates on such property throughout the State was 3.877% of true value (Fitzgerald's Legislative Manual, N. J. 1929, p. 293).

In substance, there is no difference between a tax, measured by 5% of the gross receipts, on the intangible property of appellant in the 8,403 miles of its line in the streets and the tax at local rates on the 6,800 miles on private right of way. Both, alike, carry interstate messages. If interest on the cost of 8,403 miles of private right of way, in place of the 8,403 miles now in the streets, was included, the mileage in the streets would show a distinct pecuniary advantage over that on private right of way.

The result is that instead of the method of taxation in question being a burden upon interstate commerce (to the extent, if any, that it may be indirectly affected thereby), it confers a benefit, or bounty, in actual dollars and cents, upon such commerce.

The objection is that this tax is measured by the gross receipts. The gross receipts of utility companies is a measure of taxation quite uniformly adopted among the states. It was first adopted in New Jersey in 1884 and has ever since been applied to appellant and its predecessors in interest, without objection or complaint. It is a just measure for determining taxes. By way of illustration, consider two telephone companies, each with a capital stock of $1,000,000. One is in a populated section where its customers are numerous and it is thereby able to realize gross receipts of $100,000 a year. The other company is not so favorably situated and is able to realize gross receipts of only $10,000 per year. If they were both taxed under the Act of 1895, at one-half of one per cent. on their capital stock, each would pay $5,000 taxes. This would amount to 5% of the gross receipts of the first company and 50% of the gross receipts of the second company. While these figures are arbitrary, they nevertheless

serve to illustrate the justice of a tax measured by gross receipts.

It was the desire of Legislature to take the fat with the lean (service in the lean territory being as essential to society as service in the fat territory) and establish a tax that would do justice to economic conditions and necessities. Gross receipts in this case, as in many others which this court has considered, is the *measure* and not the *subject* of the tax.

While the opinion of the New Jersey Supreme Court (R. 23, 27, incl.) cites and follows the case of *Phillipsburg, etc.* v. *Bd. of Assessors* (82 N. J. L. 49; 99 N. J. L. 319, affirmed 101 N. J. L. 225), it expressly states that:

> "Quite independent of that case, we think the method adopted by the State Board of Taxes and Assessment in the instant case was not illegal and not in violation of the commerce clause of the United States Constitution, but in harmony with the decisions of the United States Supreme Court the ultimate authority on the point here involved" (R. 26).

The decisions of this court therein cited and relied upon are: *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *Cudahy Packing Co.* v. *State of Minnesota*, 246 U. S. 450.

The Supreme Court followed Mr. Justice Van Devanter's opinion in the last mentioned case in holding that the tax in question—

> "was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as an index or measure of the value of the property for taxing purposes. * * * The method adopted for calculating the tax, viz., by gross earnings being taken merely as a measure of the value of the franchise of the prosecutor."

For these reasons the tax in question was affirmed and judgment entered thereon dismissing the writ of certiorari (R. 27).

By unanimous decision of the Court of Errors and Appeals (the court of last resort in New Jersey) the judgment of the Supreme Court was affirmed for the reasons expressed in that opinion (R. 30).

Appellant's brief proceeds on the erroneous assumption that the terms "franchise" and "license" are synonymous and that a franchise is nothing more than a license to exist as a corporation. It states (at p. 23):

> "Of course, there is no difference in principle between a tax imposed by a state or a municipality for the privilege of engaging in a certain business and a tax, such as the case at bar, imposed for the privilege of using the public street and highways. In either case, the tax is a *license* tax as distinguished from a *property* tax."

In *Jersey City Gas Co.* v. *Dwight,* 29 N. J. E. 242, the New Jersey Court of Chancery held that the right of a company to place its poles, string its wires, etc., in the public streets is a special franchise; that such a franchise is an incorporeal right. Such a special franchise was distinctly recognized by this court in *State Railroad Tax Cases,* 92 U. S. 573.

By virtue of its incorporation under the General Corporation Act (P. L. 1896, p. 277), appellant acquired the franchise or license to exist as a corporation in perpetuity.

The statutes of New Jersey recognize another and a different franchise in the right to use streets or public places, as indicated by those limiting the period for which such a franchise may be granted (P. L. 1906, p. 50, and supplements and amendments). The appellant acquired all of its franchise to use the public streets prior to the enactment of the Act of 1906 and therefore enjoys them in perpetuity.

That these two separate and distinct forms of franchise exist is recognized by all of the authorities.

The franchise of being a corporation and enjoying a unity and perpetuity of existence, is, under our general corporation laws, a right available to any group of persons. It has no property value because it is available to all and it cannot be separately assigned or sold for value. It belongs to the stockholders and not to the corporation itself. This is properly a "license" and may be taxed by the State which creates the corporation, regardless of where the business of the corporation may be conducted.

The special franchise consists of such special rights and privileges as the right of eminent domain, the right of partial appropriation and exclusive use of public property. This is a right belonging to the corporation and may be transferred, sold, or mortgaged for value. It has a definite capacity to earn money. Without it the appellant, even though it had the license to be and exist as a corporation, could not function as a public telephone company.

Appellant admits (at p. 33 of its brief):

> "It would probably be correct to say that a telephone system could not exist at all, as a practical matter, without the right to run the lines through the streets. This right being indispensible, a *sine qua non,* the property might be said to have *no value without that right.*" (Italics ours.)

The license to be a corporation may be forfeited for failure to file annual reports or to pay taxes, but its special franchises survive in the stockholders as property rights, and can be sold with other property to a successor.

In *Thompson* v. *Schenectady Ry.,* 124 Fed. 274, it was held that such a right of a street railway company was real estate. In other cases it has been held to be an easement; an interest in reality; an incorporeal hereditament.

Detroit Citizens St. Ry. v. *Detroit,* 64 Fed. 628 (635, 643);

Detroit Citizens St. Ry. v. *Common Council,* 125 Mich. 673;
Knoxville v. *Africa,* 77 Fed. 501;
Milhau v. *Sharp,* 27 N. Y. 611;
People v. *O'Brien,* 111 N. Y. 1;
Jersey City v. *Dwight,* 29 N. J. E. 242.

That this right is not a mere license but a grant of a property right, assignable, taxable, alienable for value, and of substantial legal value is held by the courts of New Jersey in

State Board v. *Central R. R. Co.,* 48 N. J. L. 146;
Hudson Telephone Co. v. *Jersey City,* 49 N. J. L. 303;
Newark v. *State Board,* 67 N. J. L. 246;
Public Service Co. v. *Board of Public Utility Comm'rs,* 84 N. J. L. 463,

and by this court in

Owensboro v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58;
Boise Artesian Water Co. v. *Boise City,* 230 U. S. 84;
St. Louis v. *Western Union Telegraph Co.,* 148 U. S. 92.

The appellant has acquired this valuable and substantial property right from the State without any consideration whatever to the State, except the reciprocal right of regulation and taxation. It ought not to be permitted, by the voluntary use for the transmission of interstate messages, of rights and privileges granted to it solely for the use of intrastate messages, to thereby escape taxation of the full value such rights and privileges.

If the State should attempt to assess an *ad valorem* tax on these property rights in the streets, how would it ascertain the value thereof from year to year? A tax per pole or mile of line would be entirely arbitrary, and in-

accurate. A telephone line in the country may have just as many poles and miles of wire to the mile of distance as a line in the city, yet the city line would undoubtedly be more valuable because it would earn the most money. By using gross receipts as the measure of the value of the property right a uniform system of taxation at a true value is attained. By this method this property is assessed by uniform rules according to its true value.

It is not necessary that all property be taxed on an *ad valorem* basis, or on any other basis. From the beginning, different classes of property in New Jersey have been taxed by different methods. In fact railroad property is, and for many years has been, assessed by three different methods, applicable to first, second and third class property, respectively. All of these different methods, including the one in question, have been repeatedly sustained by the New Jersey courts against challenges of their constitutionality. It is sufficient if all property of the *same class* is assessed by uniform rules according to its true value.

State Board v. *Central R. R. of N. J.*, 48 N. J. L. 146.

It is declared in *Cook on Corporations* (6th Edition, Volume 2, Section 572d, p. 1576):

> "It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered with. (Citing *Western Union Telegraph Co.* v. *Taggert*, 163 U. S. 1.) A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears toward the whole property. This is not interfering with interstate commerce by levying a tax for the privilege

of transacting such commerce. (Citing *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185.)"

The method employed under the Act of 1900 for the taxing of appellant's intangible property, *i. e.*, its property rights in the streets, is substantially similar to the method sustained by this court in

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217;

United States Express Co. v. *Minnesota*, 223 U. S. 335.

Congress, in its regulation of interstate commerce, has never entered the field of property taxation. Are the states, who provide these admittedly indispensable property rights, in addition to the mere right to be a corporation, to be deprived of the sovereign right to tax, when the reasonableness of the tax itself is not questioned in the record? The effect of such a construction of the Act of 1900 would be to exempt this valuable property from taxation altogether. There can be no presumption of a tax exemption. On the contrary no property will be presumed to be exempt unless expressly so declared by the Legislature.

The decisions of this court.

There is no decision of this court on a state of facts such as we have here. In none of its decisions was there involved the question of the property right of the company to use the public streets.

Out of the numerous decisions which have been rendered involving taxes measured by a percentage of gross receipts, two well marked lines appear.

In *Philadelphia and Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg and San Antonio Ry.* v. *Texas*, 210 U. S. 217, and *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298, such a tax was declared to be invalid because, in each of those cases, it was assessed directly upon the business or gross receipts of the companies

and was not in substitution for or in lieu of any other tax. In each of those cases all the property of the companies, tangible and intangible, was assessed by other methods.

In *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, and *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, this court sustained such a tax, measured by a percentage of the gross receipts from both interstate and intrastate commerce, because it was not levied directly upon the commerce or the gross receipts, and was a tax in lieu of other taxes on the company's property.

The act here in question prescribes a tax, measured by a percentage of the gross receipts, upon all intangible property *in lieu of all other taxes thereon.* It is not a tax upon the act of engaging in business or a tax upon the commerce, or upon the gross receipts, as such. On the contrary it has a substantial basis upon the intangible property of the company represented by the special franchises and exclusive rights already mentioned, which are otherwise untaxed. These special franchises and rights are *property* which is a part of a system located entirely within the State of New Jersey, and which substantially augments the value of that system and of its connected operation as a whole, and the tax in question is an appropriate means of reaching its full value as a going concern, within the rule stated in *Pullman Company* v. *Richardson*, 261 U. S. 330.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be affirmed.

Respectfully submitted,

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